

PUBLISHED IN THE DERBY REPORTER ON JANUARY 2, 2004

**TREATED WASTEWATER FRANCHISE**

**ORDINANCE NO. 45-958**

**AN ORDINANCE OF THE CITY OF WICHITA, KANSAS, GRANTING TO THE CITY OF BEL AIRE, KANSAS, A FRANCHISE FOR THE PLACEMENT OF FACILITIES FOR TREATED WASTEWATER; AND PRESCRIBING THE TERMS OF SAID GRANT AND RELATING THERETO**

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF WICHITA, KANSAS:

**SECTION 1. Definitions.** For the purposes of this franchise ordinance, the following words and phrases shall have the following meanings:

- A. “City” or “Franchisor” shall mean the City of Wichita, Kansas.
- B. “Facilities” means any portion of a treated wastewater pipeline, associated subsurface piping, and other associated equipment located in, along, over, upon, under, or through the Right-of-Way.
- C. “Franchise fee” means the Linear Foot fee and fee on Gross Receipts established under this ordinance.
- D. “Franchisee” or “Provider” means the City of Bel Aire, Kansas, when acting as the owner, operator, or user of the Facilities franchised herein.
- E. “Gross receipts” means all revenue derived by Franchisee from provision or sale of treated wastewater whether at wholesale or retail within the corporate boundaries of the City.
- F. “Linear Foot” – means the length in feet of the Right-of-Way along which is occupied by Facilities of the Provider that are not currently used to provide treated waste water to customers on which Gross Receipts are determined.
- G. “Public Project” means any project planned or undertaken by the City or any governmental entity (except Provider) for construction, reconstruction, maintenance, or repair of public facilities or improvements, or any other purpose of a public nature.

**H. "Right-of-Way"** means only the area of real property in which the City has a dedicated or acquired right-of-way interest in the real property. It shall include the area on, below or above the present and future streets, alleys, avenues, roads, highways, parkways or boulevards dedicated or acquired as right-of-way. The term does not include the airwaves above a right-of-way with regard to wireless telecommunications or other nonwire telecommunications or broadcast service or easements obtained by utilities or private easements in platted subdivisions or tracts.

## **SECTION 2. AUTHORITY TO USE RIGHT-OF-WAY**

**A. Grant.** This franchise ordinance hereby grants to Franchisee the right, privilege and authority to construct, operate, and maintain Facilities in, through and along the City's Right-of-Way, as shown in Attachment A, for the purposes, and pursuant to the terms and conditions, herein set forth. This grant limits, but does not require, Franchisee to service those customers shown in Attachment B. Any changes in Attachment A or B must be made by amendment to this Franchise as provided herein. Any service contract or rate schedule applied by Franchisee to customers shall not preclude a customer from discontinuing its receipt of treated wastewater from Franchisee and receiving such service from any other person authorized to provide such service, all without penalty or surcharge to the customer.

**B. Nature of Grant.** The grant under this Franchise shall not convey title, equitable or legal, in the Right-of-Way, and gives only the right to occupy Right-of-Way, for the purposes and for the period stated in this Franchise. The Franchise gives no right of access or use to facilities of a third party. Nothing in this Franchise shall be interpreted as granting Franchisee the ability to construct, maintain or operate any facility or related appurtenance on property owned by the City outside of the Public Right-of- Way.

**C. Franchise Non-Exclusive.** This Franchise shall be nonexclusive. The City specifically reserves the right to grant to any other person, including itself, and at any time, franchises, permits, or other rights to use the Right-of-Way for any purpose and to serve any customers, including customers of Franchisee, as it deems appropriate, subject to applicable federal and State law.

## **SECTION 3. TERM AND AMENDMENT.**

**A. Term.** This franchise ordinance shall be effective from its effective date for a term of five (5) years. Thereafter, upon option of the Franchisee, this franchise ordinance will renew for three (3) additional five (5) year terms, subject to the right of either party to renegotiate any provision of the Franchise by giving notice at least one hundred and eight (180) days before the termination of the then current term. The additional terms shall be deemed a continuation of this franchise and not as a new franchise or amendment.

**B. Amendment.** (1) Upon written request of either the City or Franchisee, the Franchise may be reviewed at any time after the effective date and either the City or Franchisee may propose amendments to any provision of the Franchise by giving thirty days written notice

to the other of the amendment(s) desired. The City and Franchisee shall negotiate in good faith in an effort to agree upon mutually satisfactory amendment(s).

(2) Upon written request of either the City or Franchisee, the Franchise shall be reopened and renegotiated upon notice of the exercise of an option under Section 3(A) or at any time upon any change in federal, state, or local law, regulation, or order which materially affects any rights or obligations of either the City or Franchisee, including but not limited to the scope of the grant to the Franchise or the compensation to be received by the City.

(3) Amendments to this Franchise, if any, shall be made by ordinance as prescribed by statute. The franchise ordinance shall remain in effect according to its terms pending completion of any review or renegotiation provided by this section.

#### **SECTION 4. USE OF RIGHT OF WAY**

**A. Use of Right-of-Way; Police Powers; Franchisee's Use Subordinate.** Facilities shall be placed with adequate clearance from existing public or private utilities in the Right-of-Way so as not to impact or be impacted by such public or private utilities or improvements. Franchisee shall construct and maintain its Facilities in accordance with all applicable federal, state and local laws, including all State-approved work plans or permits, and all other City codes and ordinances in effect as of the date of this Franchise or hereinafter adopted to the extent not in contravention of state or federal law. The Franchise does not in any way impact the continuing authority of the City through the proper exercise of its Home Rule powers to adopt and enforce ordinances necessary to provide for the health, safety and welfare of the public. In entering this Franchise, the City makes no express or implied representation or warranty regarding its rights to authorize the installation or construction of Facilities on any particular segment of the Right-of-Way. The burden and responsibility for making all such determinations in advance of construction or installation shall be entirely upon Franchisee. The use of the Right-of-Way authorized by this Franchise shall in all matters be subordinate to the City's use and rights therein. Franchisee shall coordinate the placement of its Facilities in a manner that minimizes adverse impact on public and private improvements, as reasonably determined by the City Engineer.

**B. No Interference.** Franchisee shall construct and maintain its Facilities so as not to interfere with other users of the Right-of-Way. All construction and maintenance by Franchisee or its subcontractors shall be performed in accordance with industry standards.

**C. Exclusion of Certain Locations.** Prior to Franchisee's installation of any Facilities in the Right-of-Way, and after it provides the City with its proposed plans for the Facilities, the City may in its reasonable discretion designate certain locations or improvements in the Right-of-Way to be excluded from use by Franchisee for its Facilities, including, but not limited to any location or improvement that in the reasonable judgment of the City Engineer is incompatible with the proposed Facilities, or would be rendered unsafe or unstable by the installation. The City Engineer may further exclude certain other locations or improvements that have been designated or planned for other use, or are not otherwise available for use by Franchisee due to engineering, technological, proprietary, legal, or other limitations or

restrictions as may be reasonably determined by the City. The City shall provide a written explanation for any denial for a particular location and shall work with Franchisee to identify other suitable routes.

**D. Location, Type and Design of Facilities Subject to Approval.**

The design, location, and nature of all Facilities shall be subject to the reasonable review and approval of the City Engineer. This is a means to properly manage and control all Right-of-Way usage in the City, and to protect the public health, safety, and welfare. The review and approval is to ensure efficient coordination relating to Right-of-Way use relating to public and private utilities and to evaluate the configuration and size of Facilities that may be located in the Right-of-Way or other public or private property.

All Facilities constructed by Franchisee shall be placed underground unless otherwise agreed to by the City.

**E. Right-of-Way Management Code.** The City reserves its rights to adopt a Right-of-Way management and construction standards ordinance of general applicability pursuant to its public health, safety and welfare authority which shall apply to this Franchise except where inconsistent with a material term of the Franchise.

**F. Underground Facility Locating Service.** Franchisee shall cooperate with and participate fully in providing reputable underground facility locating services to insure that damage and/or interference with other underground facilities occupants is minimized. This shall include, but not be limited to, participation with the Kansas One Call.

**G. Permit Requirements.** While this Franchise establishes the general rules and scope of authority for Franchisee to construct and maintain its Facilities within the Right-of-Way, Franchisee is still required to obtain individual permitting approval from the City Engineer prior to engaging in actual construction of its specific Facilities within the Right-of-Way. At least fifteen (15) days before the beginning of any installation, removal or relocation of its Facilities, Franchisee shall submit detailed plans of the proposed action to the City Engineer. The City Engineer shall, within fifteen (15) days of receipt of such plans, either approve the plans or inform Franchisee of the reasons for disapproval. Franchisee shall designate a responsible contact person with whom representatives of the City Engineer can communicate with on all matters relating to facilities installation and maintenance. Prior to any excavation within the Right-of-Way, Franchisee shall obtain a permit, pay all applicable fees, and perform such work in accordance with applicable provisions of the City Code, and any ordinances or regulations that may be adopted by the City regarding excavation work.

**H. As Built Drawings.** Franchisee shall keep and maintain accurate records and as-built drawings, in both paper and electronic format, of all Facilities constructed, reconstructed, or relocated in the Right-of-Way after the date hereof. Such Facilities shall be horizontally and vertically located at least every 100 feet and at any other alignment change. All points of Facilities shall be horizontally located from street centerline, or section or quarter section lines or corners. Vertical locations on all points of Facilities shall consist of elevations in either City datum or United States Geological Survey datum. Franchisee shall cooperate promptly and fully

with the City and take all reasonable measures necessary to provide accurate and complete information regarding the nature and horizontal and vertical location of its Facilities located within Right-of-Way when requested by the City or its authorized agents for a Public Project. Such location and identification shall be at the sole expense of Franchisee without expense to the City, its employees, agents, or authorized contractors

**I. Relocation of Facilities.** Franchisee shall, within a reasonable time, relocate or adjust any Facilities located in Right-of-Way if reasonably necessary and requested by the City for a Public Project. Such relocation or adjustment for a particular Public Project shall be performed by Franchisee without expense to the City, its employees, agents, or authorized contractors and shall be specifically subject to rules and regulations of the City pertaining to such; provided, that if Franchisee demonstrates to the satisfaction of the City that the Facility was originally established in a private easement that thereafter became part of the Right-of-Way, the relocation or adjustment shall be without expense to Franchisee.

**J. Agent.** Franchisee shall designate and maintain an agent, familiar with the Facilities, who is responsible for timely satisfaction of the information needs of the City and other users of the Right-of-Way.

## **SECTION 5. FEES AND COMPENSATION**

**A. Franchise Fee.** In consideration for this franchise ordinance, Franchisee shall pay to the City a Franchise Fee as follows:

- (1) Five per cent (5%) of Gross Receipts; and
- (2) Two Dollars and fifty cents (\$2.50) per year for each Linear Foot of the Right-of-Way occupied by Franchisee's Facilities plus five cents (\$.05) per cubic foot for space occupied by any underground equipment vault, provided that this Linear Foot fee shall not apply to any Facilities serving customers for which the Gross Receipts fee is paid by Franchisee.

**B. Timing of Payment of Fees.** Franchisee shall give the City written notice at the time that payment is due whenever there is a change in the use of any Facilities that are subject to Gross Receipt or Linear Foot payments. Unless otherwise agreed by the parties, the Franchise Fee on Gross Receipts shall be due and payable on a monthly basis within thirty (30) calendar days after the end of the remittal period. The Linear Foot fee shall be due annually on the anniversary date of this ordinance. Linear Foot fee payments shall be prorated based upon date of installation of the Facilities or the date the Facilities become subject to Gross Receipt payments. If any Franchise Fee, or any portion thereof, is not delivered on or before the due date, interest thereon shall accrue from the due date until received, at the applicable statutory interest rate.

**C. Audit.** The City or its designated representatives shall have the right to examine, upon written notice to Franchisee no more often than once per calendar year, those records (including meter readings) necessary to verify the correctness of the Franchise Fees.

## **SECTION 6. TRANSFER OF OWNERSHIP**

**A.** Franchisee shall not sell, transfer, lease, assign, sublet, or dispose of, in whole or in part, either by forced or involuntary sale, or by ordinary sale, consolidation, or otherwise, this Franchise or any of the rights or privileges granted by such Franchise, without the prior written consent of the City. Such consent shall not be unreasonably withheld, delayed or denied. The City reserves the right to be reimbursed for its reasonable costs relating to a transfer of ownership.

**B.** Any assignment or transfer shall not require consent of the City when the Franchise is assigned, sold or transferred between wholly-owned subsidiaries of a parent corporation, provided that Franchisee provides advance written notice to the City. In all such instances, the assignee or new owner shall be responsible for all Franchise requirements and obligations.

## **SECTION 7. GENERAL CONDITIONS**

**A. Compliance With Laws.** The Franchisee shall comply with all applicable federal, state and local laws, ordinances, regulations and policies, including, but not limited to, all laws, ordinances, regulations and policies relating to construction and use of public property.

**B. Enforcement; Attorneys' Fees.** The City and Franchisee shall be entitled to enforce this Franchise through all remedies lawfully available, and shall pay to the other reasonable attorneys' fees in the event that it is determined judicially to have violated the terms of this Franchise.

**C. Advertising, Signs or Extraneous Markings.** Franchisee shall not place, or cause to be placed, any sort of signs, advertisements or other extraneous markings, whether relating to Franchisee or any other person or entity on the public Right-of-Way, except such necessary minimal markings as approved by the City as are reasonably necessary to identify the Facilities for service, repair, maintenance or emergency purposes, or as may be otherwise required to be affixed by applicable law or regulation.

**D. Removal of Facilities.** Upon expiration of this Franchise, whether by lapse of time, by Franchise between Franchisee and the City, or by forfeiture thereof, Franchisee shall remove, at its sole cost, from public property any and all of its Facilities that are the subject of this Franchise within a reasonable time after such expiration, and it shall be the duty of Franchisee promptly upon such removal to restore the Right-of-Way from which the Facilities are removed to as good condition as the same were before the removal was effected and as required by the City. Notwithstanding the foregoing, upon request of Franchisee, the City may allow underground Facilities to be left in place when it is not practical or desirable to require removal.

## **SECTION 8. LIABILITY AND INDEMNIFICATION**

**A.** It shall be the responsibility of Franchisee to take adequate measures to protect and defend its Facilities in the Right-of-Way from harm or damage. If Franchisee fails to accurately or timely locate Facilities when requested, it has no claim for cost or damages against the City and its authorized contractors unless such party is responsible for the harm or damage by its negligence or intentional conduct. Franchisee shall be responsible to the City and its agents, representatives and authorized contractors for all damages including, but not limited to, delay damages, repair costs, down time, construction delays, penalties or other expenses of any kind arising out of the failure of Franchisee to perform any of its obligations under this Franchise except to the extent the damaged party is responsible for the harm or damage by its negligence or intentional conduct. Provided, however, the City and its authorized contractors shall be responsible to take reasonable precautionary measures including calling for utility locations and observing marker posts when working near the Facilities.

**B.** Franchisee shall hold and save and defend the City, its officers, employees, agents, and authorized contractors, harmless from and against all claims, damages, expense, liability, and costs including attorney fees, to the extent occasioned in any manner by the failure of Franchisee to perform any of its obligations under this Franchise, except to the extent the City, its officers, employees, agents, and authorized contractors are responsible for the harm or damage as a result of its negligence or intentional conduct. In the event a claim shall be made or an action shall be instituted against the City growing out of any such failure by Franchisee to perform its obligations under this Franchise then, upon notice by the City to Franchisee, Franchisee shall assume liability for the defense of such actions at the cost of Franchisee, subject to the option of the City to appear and defend, at its own cost, any such case.

**C.** Franchisee agrees that it will conduct its activities in the Right of Way in compliance with all applicable environmental laws. Franchisee agrees to defend, indemnify, and hold the City harmless from and against any and all claims, causes of action, demands, and liability, including, but not limited to damages, costs, expenses, assessments, penalties, fines, losses, judgments, and attorney fees that the City may suffer due to the possible existence or the discovery of any hazardous substance in the Right of Way or the migration of any hazardous substance to other property or released into the environment to the extent such arises out of Franchisee's past, present, or future negligent or unlawful activities in the Right of Way. This Paragraph shall survive the termination of this Lease.

## **SECTION 9. INSURANCE**

**A.** During the term of this Franchise, unless specified otherwise, Franchisee shall obtain and maintain at its sole expense, with financially reputable insurers that are licensed to do business in the state of Kansas, naming the City as Certificate Holder, not less than the following insurance: Commercial general liability, including coverage for contractual liability and products completed operations liability on an occurrence basis and not a claims made basis, with a limit of not less than One Million Dollars (\$1,000,000) combined single limit per occurrence for bodily injury, personal injury, and property damage liability, naming the City as Certificate Holder. Alternatively the Franchisee may demonstrate to the reasonable Satisfaction of the City that the Franchisee is adequately self-insured.

**B.** Nothing contained in this Franchise shall limit Franchisee's liability to the City to the limits of insurance certified or carried.

#### **SECTION 10. INVALIDITY AND REMEDIES**

**A.** The invalidity in whole or in part of any provision of this Franchise shall not affect the validity of any other provision.

**B.** The right and remedies of the Parties under this Franchise shall be cumulative and in addition to any other rights and remedies provided by law or equity. A waiver of a breach of any provision thereof shall not constitute a waiver of any other breach. The laws of the State of Kansas shall govern this Franchise and any rights granted hereunder.

#### **SECTION 11. ACCEPTANCE**

Prior to the effective date of this ordinance Franchisee shall file with the City Clerk of the City of Wichita its acceptance in writing of the provisions, terms and conditions of this ordinance, which acceptance shall be duly acknowledged before an officer authorized by law to administer oaths. When so accepted the ordinance and acceptance shall constitute a contract between the City and Franchisee subject to the provisions of the laws of the state of Kansas.

#### **SECTION 12. GOVERNING LAW AND VENUE**

**A.** The franchise ordinance and the rights herein granted are subject to the provisions of existing federal and state laws, including K.S.A. 12-2001, and those hereafter enacted pertaining to the granting of franchises.

**B.** The obligations and undertakings of both parties hereto shall be performed at Wichita, Sedgwick County, Kansas. In the event that any legal proceeding is brought to enforce the terms of this franchise, the same shall be brought in State or Federal courts, as appropriate, having jurisdiction for Sedgwick County, Kansas.

#### **SECTION 13. EFFECTIVE DATE OF ORDINANCE**

This franchise ordinance shall be effective upon its final passage and publication once in the official City paper.

**PASSED AND APPROVED** by the governing body of Wichita, Kansas this date, December 30, 2003.



CITY OF WICHITA, KANSAS

---

Carlos Mayans, Mayor

ATTEST:

---

Karen Schofield, City Clerk

Approved as to Form:

---

Gary E. Rebenstorf, City Attorney